

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 02-278
the Telephone Consumer Protection of)	CC Docket No. 92-90
1991)	

Comments of the Public Utility Commission of Texas

On September 18, 2002, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking and Memorandum and Order (*NPRM*) regarding its rules and regulations that restrict telemarketing calls. The FCC is interested in finding out whether its rules, adopted in 1992, need to be revised in order to more effectively carry out the directives of the Telephone Consumer Protection Act (TCPA) of 1991 relating to privacy rights, public safety interests, and telemarketers' rights. In particular, the FCC seeks input on whether its rules governing unwanted telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines should be revised or clarified to address the technological innovations in the past ten years. The FCC also seeks comment on the effectiveness of company-specific do-not-call lists. Further, the FCC seeks comment on whether to establish a national do-not-call list and, if so, how that action might be taken in conjunction with the Federal Trade Commission's (FTC's) recent proposal to adopt a national do-not-call list and with various state do-not-call lists.

The Public Utility Commission of Texas (Texas PUC), having general regulatory authority over public utilities within our jurisdiction in Texas, submits these comments in response to the *NPRM*. The Texas PUC limits its comments in this proceeding to the discussions relating to the implementation of the Texas no-call list, the establishment of a national no-call list, and the relationship between a national no-call list and existing state no-call lists.

TEXAS NO-CALL LISTS

The FCC seeks comment on how state commissions have dealt with issues relating to compiling and maintaining the state established do-not-call lists (*NPRM* ¶52).

In Texas, consumers have the option of placing their telephone numbers on two do-not-call lists. The first no-call list was enacted in 1999 as part of legislation designed to introduce competition in the Texas retail electric market. Under the Public Utility Regulatory Act, the Texas PUC is required to establish and provide for the operation of a database to compile a list of customers who object to receiving telephone solicitations relating to the customer's choice of retail electric providers.¹ Two years later, the Texas Telemarketing Disclosure and Privacy Act² was enacted. Under this statute, the Texas PUC is required to establish and provide for the operation of a database to compile a list of names, addresses, and telephone numbers of Texas consumers who object to receiving unsolicited telemarketing or telephone calls.³ The two no-call lists are maintained separately by the Texas PUC.⁴ For the purpose of these comments, the Texas PUC will restrict its discussion to the implementation of the statewide no-call list.

A consumer may register a residential telephone number on the Texas no-call list by telephone, e-mail, fax, or mail. An entry on the no-call list expires on the third anniversary of the date the entry is first published on the list.⁵ An entry may be renewed for successive three-year periods.⁶ The telephone number of the consumer on the Texas no-call list may be deleted from the list on the consumer's written request or if the telephone number of the consumer is changed.⁷ The Texas no-call list is disseminated in formats, including electronic formats, commonly used by persons making telemarketing calls.⁸ The no-call list is distributed to telemarketers on a quarterly basis.⁹ The first

¹TEX. UTIL. CODE ANN. § 39.1025.

² H.B. 472, 77th Leg., R.S., ch. 1429, 2001 Tex. Gen. Laws 5102 (codified at TEX. BUS. & COM. CODE ANN., Chapter 43.)

³ TEX. BUS. & COM. CODE ANN. §43.101(a).

⁴ A copy of the Texas No-Call List Substantive Rules for both electric (P.U.C. SUBST. R. 25.484) and telephone (P.U.C. SUBST. R. 26.37) are attached.

⁵ TEX. BUS. & COM. CODE ANN. §43.101(c).

⁶ TEX. BUS. & COM. CODE ANN. §43.101(c).

⁷ TEX. BUS. & COM. CODE ANN. §43.101(c).

Texas no-call list was published on April 1, 2002. As of November 18, 2002, over 790,000 telephone numbers have been included in the Texas no-call registry.

The Texas PUC is authorized to investigate complaints and to assess administrative penalties for violations of the Texas no-call list involving all entities except state licensees.¹⁰ Since July 1, 2002, the Texas PUC has received close to 3,800 “do not call list” complaints from consumers.

One issue related to enforcement of the Texas no-call list is the lag time between the registration date and the enforcement date of the no-call list. A related issue is consumer confusion regarding the distinction between the registration date, the publication date, and the enforcement date of the no-call list. The enforcement date of each no-call list is associated with the date the no-call list is published rather than the date the individual signed up on the list.¹¹ Because the no-call list is only published four times a year, residents who register to be included on the list just after a publication date may wait up to three months before the next no-call list is published. Furthermore, telemarketers have up to sixty days from the publication date to comply with the current no-call list. Thus, some Texas residents may wait almost five months before they witness a reduction in the number of unwanted telemarketing calls received. The Texas PUC recommends that the national no-call list be updated daily, if possible, to minimize the delay in the initiation of enforcement activities.

The Texas PUC was not appropriated any funds to operate the Texas no-call list, therefore, the Texas PUC relies on consumer fees and distribution fees to operate the registry. State law allows the Texas PUC to charge a person a reasonable amount not to exceed \$3 for a request to place a telephone number on the Texas no-call list or to renew

⁸ TEX. BUS. & COM. CODE ANN. §43.103(a)(3)(A).

⁹ TEX. BUS. & COM. CODE ANN. §43.101(c).

¹⁰ TEX. BUS. & COM. CODE ANN. §43.102(b).

¹¹ A telemarketer may not make a telemarketing call to a telephone number that has been published on the Texas no-call list more than 60 days after the telephone number appears on the then-current list. TEX. BUS. & COM. CODE ANN. §43.102(a).

an entry on the list.¹² In addition, the Texas PUC may charge a fee, not to exceed \$75, to distribute the Texas no-call list to telemarketers.¹³ Based on comments from telemarketers subject to the Texas Telemarketing Disclosure and Privacy Act, the cost of compliance may pose a larger burden on small telemarketing companies and individual telemarketers. The Texas PUC is therefore supportive of a cost structure that considers the burden of compliance costs relative to the size of a telemarketing operation.

ESTABLISHMENT OF A NATIONAL NO-CALL LIST

The FCC seeks comment on what effect, if any, some combination of efforts by the FTC, states, and the FCC would have on the cost and privacy issues involved in developing and maintaining a national do-not-call list. (*NPRM* ¶52). As the FCC notes in the *NPRM* ¶10, the FTC acknowledges in its proposed rules that certain entities, including banks, credit unions, savings and loans, common carriers, nonprofit organizations and insurance companies, would not be included in the proposed FTC no-call list because they are specifically exempted from the Telemarketing Consumer Fraud and Abuse Prevention Act. Consequently, a consumer wishing to halt all telephone solicitations would likely sign up on both the FCC and the FTC no-call lists if two separate registries were established. As the FCC contemplates modifications to its rule in this proceeding, the Texas PUC encourages the FCC to consider that the creation of one national no-call list would not only reduce the costs associated with the development and maintenance of two separate no-call databases providing essentially the same service to the same group of consumers, it would also fulfill consumer expectations that registration on a “national no-call list” should stop unwanted telephone solicitation calls from any entity subject to federal and state regulatory authority.

With regard to the privacy interests of consumers, the Texas PUC is concerned about the availability of the national no-call database pursuant to a Freedom of Information Act (FOIA) request or a similar request under state open records laws. The

¹² TEX. BUS. & COM. CODE ANN. §43.101(c).

¹³ TEX. BUS. & COM. CODE ANN. §43.103(a)(3)(B).

Texas PUC urges the FCC to include appropriate provisions to except the no-call database from public disclosure under FOIA or any similar state law. In addition, the Texas PUC encourages the FCC to include language that prohibits the use of the database for any purpose other than compliance with the restrictions on telephone solicitations and that prohibits a telemarketer from selling or otherwise transferring the list to any other entity for any purpose.

RELATIONSHIP BETWEEN A NATIONAL DO-NOT-CALL LIST AND EXISTING STATE LAWS

The FCC seeks comment on several issues concerning the effect of establishing a nationwide do-not-call list on state do-not-call laws, and the role state would play in the administration and enforcement of the federal requirements. (*NPRM* ¶¶60-61, 65-66). As part of the federal law, and as highlighted by the FCC in the *NPRM* ¶48, “the TCPA does not preempt any state law that imposes more restrictive intrastate requirements or regulations on, or which prohibits:

- A. the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- B. the use of automatic telephone dialing systems;
- C. the use of artificial or prerecorded voice messages; or
- D. the making of telephone solicitations.”

The Texas PUC believes that an enforcement policy can be constructed in such a way to allow investigation and prosecution of complaints at both the federal and state level, and that through cooperation and sharing of information, states rights can be preserved to enforce state no-call-list violations.

Should the FCC, in conjunction with the FTC, create a national no-call list, the Texas PUC encourages the FCC to work cooperatively with the FTC and with states in the administration of that database. A national no-call database should be designed to enable each state to access information for the purposes of administration and enforcement of state law, as required under 47 U.S.C. §227(c)(3)(J). Independent direct access to the proposed national no-call list will allow utility commissions to use the list

more effectively for enforcement purposes. For the Texas PUC, direct access will be critical if the Texas no-call list is replaced at some point by a national no-call list.

The FCC noted in *NPRM* ¶60 that state no-call lists “vary widely in the methods used for collecting data, the fees charged, and the types of entities required to comply with their restrictions.” The Texas PUC therefore recommends that the FCC and the FTC establish a working group comprised of state utility commission representatives to ensure that the national no-call database and the existing and/or contemplated state computer systems are technologically compatible. Furthermore, the Texas PUC advocates that the FCC work with the FTC and the states so that consumers need only register once for inclusion in both the national and state do-not-call registries.

CONCLUSION

We appreciate the opportunity to offer our comments in this proceeding. The Texas PUC recommends that the national no-call list be published daily, if possible, to minimize the delay in the initiation of enforcement activities. The Texas PUC also recommends that state regulatory commissions have independent direct access to the proposed national no-call list in order to be able to use it effectively in enforcement cases. The Texas PUC urges the FCC to consider the implication of laws designed for access to government processes and individual privacy interests. Further, the Texas PUC encourages the FCC to consider the cost of compliance in creating a pricing structure for telemarketers who must purchase a national do not call list.

Respectfully submitted,

Public Utility Commission of Texas
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326

November 21, 2002

/original signed/
REBECCA KLEIN
Chairman

/original signed/
BRETT A. PERLMAN
Commissioner

/original signed/
JULIE CARUTHERS PARSLEY
Commissioner